

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

JAMES ZGLESZEWSKI

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**CRIMINAL ACTION
NO. 02-774**

MEMORANDUM OPINION AND ORDER

RUFÉ, J.

February 10, 2004

Presently before the Court is Defendant James Zgleszewski's Motion for Half-Way House and Home Confinement Pursuant to 18 U.S.C. § 3624(c) and BOP Program Statement 7310.04. Defendant pleaded guilty to five counts of mail fraud in violation of 18 U.S.C. § 1341. On March 14, 2003, Defendant was sentenced to forty-two (42) months imprisonment and three years supervised release, and ordered to pay \$2,355,752 in restitution. See Doc. # 8 (Judgment). Defendant was ordered to surrender himself on March 28, 2003, see id., and is presently serving his term of imprisonment at Lewisburg Federal Penitentiary in Union County, Pennsylvania.

On January 7, 2004, Defendant filed the instant motion pro se. He seeks an Order directing the Bureau of Prisons ("BOP") to place him in a Community Corrections Center ("CCC" or "half-way house") for at least six months of his term of imprisonment. The title of Defendant's motion suggests that Defendant also wishes to be placed in home confinement. In support the motion Defendant cites 18 U.S.C. § 3624(c), which provides that the BOP "shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will

afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community." He also cites BOP Program Statement 7310.04, which states that the BOP "is not restricted by § 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the 'last ten percentum of the term,' or more than six months, if appropriate." BOP Program Statement 7310.04 at 4 (issued 12/16/98) (available at www.bop.gov).

In addition, Defendant cites Cioffoletti v. Federal Bureau of Prisons, No. 03 CV 3220(ILG), 2003 WL 23208216 (E.D.N.Y. Nov. 6, 2003), one of a slew of cases addressing the validity of a December 13, 2002 Memorandum Opinion of the Deputy Attorney General, written by the Office of Legal Counsel (the "OLC Memo"). The OLC Memo reversed approximately fifteen years of established practice whereby the BOP routinely honored judicial recommendations to place certain offenders in CCC's for the imprisonment portion of their sentences, concluding such practice was unlawful under 18 U.S.C. §§ 3621-22.¹ See generally Colton v. Ashcroft, __ F. Supp. 2d ___, Civ. A. No. 03-554-JBC, 2004 U.S. Dist. LEXIS 574, at *2-4 (E.D. Ky. Jan. 15, 2004) (explaining reversal of BOP policy). Numerous federal district courts have invalidated the new policy as procedurally defective under the Administrative Procedures Act, 5 U.S.C. § 551 et seq., and substantively invalid because it is an unreasonable agency interpretation. See Dismas Charities, Inc. v. United States Department of Justice, Federal Bureau of Prisons, 287 F. Supp. 2d 741, 743 n.3 (W.D. Ky. 2003) (collecting cases). The Court is well aware of these (and other) BOP policies and judicial developments, but concludes they have no application to the case at bar.

¹ The OLC Memo concludes: "When a federal offender receives a Zone C or Zone D sentence of imprisonment, section 3621 and section 3622 of title 18 do not give BOP general authority to place the offender in community confinement from the outset of his sentence. Nor do they give BOP general authority to transfer him from prison to community confinement at any time BOP chooses during the course of his sentence." Id. at 8 (available at <http://www.usdoj.gov/olc/2002opinions.htm>).

Having been imprisoned since March 28, 2003, Defendant has completed approximately ten months of a forty-two month term of imprisonment, leaving approximately thirty-two months imprisonment remaining in his sentence. Insofar as his motion invokes the “10% rule” of § 3624(c), it is premature. Additionally, Defendant’s motion provides no information regarding his efforts to secure a transfer to a CCC. Nor does Defendant assert that the BOP has refused or stated that it would refuse to transfer him to a CCC. See 18 U.S.C. § 3621(b) (granting authority to BOP to “designate the place of the prisoner’s imprisonment”). Defendant certainly has no right to placement in a CCC, nor did the Court recommend that BOP place Defendant in a CCC. See Doc. # 8 (Judgment). Even the Government concedes that “[a]t the appropriate time and pursuant to BOP regulations, the defendant may qualify for a community corrections center after he has served the majority of his sentence.” Government’s Response at 2. Accordingly, there being no imminent, cognizable injury to Defendant, he lacks standing to pursue any relief in this case. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (injury must be “concrete and particularized and . . . actual or imminent, not conjectural or hypothetical”). The motion is denied.

The appropriate vehicle for Defendant to obtain the relief sought is a petition for writ of habeas corpus. See, e.g., Colton, 2004 U.S. Dist. LEXIS 574, at *11-12. Courts have examined similar cases under both 28 U.S.C. § 2241 and 28 U.S.C. § 2255. See Dismas Charities, 287 F. Supp. 2d at 743 n.3 and cases cited therein. Nonetheless, because Defendant is challenging the manner in which his sentence is being executed and not seeking to vacate his sentence as illegally

imposed,² Defendant should seek the writ under 28 U.S.C. § 2241 and comply strictly with its procedural and substantive requirements. See, e.g., Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (“Generally, motions to contest the legality of a sentence must be filed under [28 U.S.C.] § 2255 in the sentencing court, while petitions that challenge the manner, location, or conditions of a sentence’s execution must be brought pursuant to [28 U.S.C.] § 2241 in the custodial court.”).

An appropriate Order follows.

² As Defendant states in a February 4, 2004 letter to the Court (to be docketed with this Memorandum Opinion and Order), “I am not attacking my sentence, but simply requesting an ORDER to be transferred to a Halfway House, maximum of 6 months allowable under 18:3624(c).”

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ORDER

AND NOW, this 10th day of February, 2004, upon consideration of the Motion for Half-Way House and Home Confinement Pursuant to 18 U.S.C. § 3624(c) and BOP Program Statement 7310.04 [Doc. # 13], the Government's Response thereto [Doc. # 15], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that the Motion is **DISMISSED**.

The Clerk of Court is hereby directed to file on the case docket the attached Letter of 2/4/04 from J. Zgleszewski to Hon. C.M. Rufe.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.